Re Sing Lian Sdn Bhd; Lim Jit Kim @ Lim Tian Jee & Ors v Goh Siew Koon @ Eng Sing Kuan & Ors

HIGH COURT (MELAKA) — COMPANIES WINDING UP NO 28–38 OF 2001
LOW HOP BING J
20 SEPTEMBER 2004

Companies and Corporations — Winding-up — Petition — Application to strike out petition — Multiplicity of proceedings — Two petitions presented by same petitioners upon similar grounds — Whether duplicity of proceedings — Courts of Judicature Act 1956 s 25(2) and para 11 of Schedule — Companies Act 1965 ss 222, 218(1)(f) & (i)

Companies and Corporations — Winding-up — Petition — Application to strike out petition — Multiplicity of proceedings — Whether second petition must necessarily be struck out or more appropriate to stay — Courts of Judicature Act 1956 s 25(2) and para 11 of Schedule — Companies Act 1965 ss 222, 218(1)(f) & (i)

This was the respondent's application by way of notice of motion to strike out the winding-up petition presented by the petitioners against the respondents' company ('the company') pursuant to s 218(1)(f) and (i) of the Companies Act 1965 ('the 1965 Act') on the grounds that: (1) there would be a multiplicity of proceedings; (2) there had been a serious non-disclosure respecting an earlier winding-up petition ('the first petition'); (3) the instant petition was filed in bad faith and with the ulterior motive of obtaining oppressive interlocutory-relief *ex parte*; and (4) that the instant petition was an abuse of the process of the court. It was revealed that the petitioners had presented the first petition against the company under the same provisions of the 1965 Act and upon similar grounds. Before the first petition could be advertised or served on the company, the respondents had instituted committal proceedings against the petitioners for presenting it. However, the High Court had dismissed the committal proceedings and the respondents immediately filed an appeal to the Court of Appeal, pending which the petitioners did not take any further action on the first petition.

Held:

(1) Whether or not a multiplicity of proceedings in respect of the winding-up of a company would lead to the striking out of the subsequent petition or petitions would have to depend on the facts and circumstances of each particular case. In the present case, the instant winding-up petition was presented by the same petitioners against the same respondents upon substantially similar grounds. There was, therefore, a duplicity of proceedings (see para 22).

(2) It was inappropriate to strike out the instant petition. Indeed, it would be more suitable that the instant petition be stayed in accordance with

s 25(2) of the Courts of Judicature Act 1956 read together with para 11 of the Schedule thereto or s 222 of the 1965 Act, pending the hearing and determination of the first petition (see para 34).

[**Bahasa Malaysia summary**

Ini merupakan permohonan responden melalui notis usul untuk membatalkan petisyen kebankrapan yang dibawa oleh pempetisyen terhadap syarikat responden ('syarikat tersebut') menurut s 218(1)(f) dan (i) Akta Syarikat 1965 ('Akta 1965') atas alasan: (1) akan terdapatnya pergandaan prosiding; (2) adanya kegagalan pendedahan yang serius mengenai petisyen kebankrapan yang terdahulu; (3) Petisyen ini telah difailkan dengan niat jahat dan motif tersembunyi untuk mendapatkan relif interlokutari yang menindas, secara *ex parte*; dan (4)bahawa petisyen ini merupakan penyalahgunaan proses mahkamah. Adalah dinyatakan bahawa pempetisyen-pempetisyen telah mengemukakan petisyen pertama terhadap syarikat di bawah peruntukan yang sama Akta 1965 dan bersandarkan alasan-alasan yang sama. Sebelum petisyen pertama boleh disiarkan dan dikemukakan kepada syarikat, responden telah memulakan prosiding komital terhadap pempetisyen-pempetisyen yang telah mengemukakannya. Walau bagaimanapun, Mahkamah Tinggi telah menolak prosiding komital itu dan seterusnya responden telah memfailkan rayuan kepada Mahkamah Rayuan, sementara itu pempetisyen-pempetisyen tidak mengambil apa-apa tindakan atas petisyen pertama.

Diputuskan:

(1) Sama ada pergandaan prosiding kepada kebankrapan suatu syarikat akan membawa kepada pembatalan petisyen atau petisyen-petisyen berikutnya bergantung kepada fakta-fakta dan keadaan-keadaan sesuatu kes tersebut. Di dalam kes ini, petisyen kebankrapan ini telah dikemukakan oleh pempetisyen-pempetisyen yang sama terhadap responden-responden yang sama bersandarkan alasan-alasan yang sama. Oleh itu, terdapatnya pergandaan prosiding (lihat perenggan 22).

(2) Adalah tidak wajar untuk membatalkan petisyen ini. Sebenarnya, lebih sesuai sekiranya petisyen ini digantung menurut s 25(2) Akta Mahkamah Kehakiman 1964 dibaca bersama perenggan 11 Jadual atau s 222 Akta 1965, sementara menunggu pendengaran dan keputusan petisyen pertama (lihat perenggan 34).]

Notes

For cases on winding up of petitions, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152–1219.

Cases referred to

Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd [1989] 2 MLJ 423 (refd)
Building Societies Trust Ltd, Re (1890) 44 Ch 140 (refd)
European Banking Co; ex p Baylis, Re (1866) LQ 2 Eq 521 (refd)
Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1) [1998] 1 MLJ 99 (refd)
Filby Bros (Provender) Ltd, Re [1958] 1 WLR 683 (refd)
Hanhyo Sdn Bhd v Marplan Sdn Bhd & Ors [1992] 1 MLJ 51 (refd)
Joint Stock Coal Co, Re (1869) 8 LR Eq 146 (refd)
Ladli Parshad Jaiswal v Karnal Distillery Co Ltd (1954) 24 Comp Cas 77 (refd)
Lim Oh & Ors v Allen & Gledhill [2001] 3 MLJ 481 (refd)
Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan [2002] 3 MLJ 155 (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd & other Appeals [2001] 4 MLJ 187 (refd)
Norton Iron Co, Re (1877) 47 LJ Ch 9 (refd)
Overseas Union Finance Ltd v Lim Joo Chong [1971] 2 MLJ 124 (refd)
Saipem (M) Sdn Bhd & Anor v AG & P (M) Sdn Bhd (In liquidation) & Ors [1996] 1 MLJ 239 (refd)
Syed Ahmad Abdul Salam & Ors v Naina Mohamed & Sons (Penang) Sdn Bhd [1998] 3 CLJ Supp 81 (refd)
Yong Siew Choon v Kerajaan Malaysia [2003] 2 MLJ 150 (refd)

Legislation referred to

Civil Law Act 1956 s 8(1)
Companies Act 1965 ss 218(1)(f), (i), 222
Courts of Judicature Act 1964 s 25(2), Schedule
Rules of the High Court 1980 O 15 r 6A(1), O 18 r 19, O 21 r 2(1), 3, O 92 r 4

SP Chandra (SF Pang & Chandra) for the petitioners.
Lim Kian Leong (Tan Shin Shin with him) (Lim Kian Leong & Co) for the respondents.

Low Hop Bing J:

I APPLICATION

[1] This is the seventh respondent's application by way of notice of motion in encl 28 for an order that:

(1) the petitioners' request to withdraw this petition ('the withdrawal') be set aside;

(2) in the alternative, the withdrawal be varied to include the following terms:

(a) that the petitioners should not re-file any petition based on the same or similar facts as the present petition;

(b) that the petitioners should not raise, in any other legal suit or proceedings, the same or similar facts as set out in the present petition;

(c) that the petitioners should pay the costs of the petition and of all applications filed by the party in the present petition on a solicitors and own client basis;

(d) that the proceedings in the Companies (Winding-Up) Petition No MT1–28–23 of 2004 ('the second petition') be stayed:

(i) until the costs in para (c) above had been taxed and fully paid by the petitioners to the seventh respondent; and

(ii) until the final disposal of the respondents' action for damages provided that the action for damages is filed within six months from the date of this order; and

(e) such other order as this court deems fit.

II FACTUAL BACKGROUND

[2] The affidavit in support of this application was affirmed by one Tey Liong Seng, a director of the seventh respondent. The allegations of fact revealed that the petitioners had requested to withdraw this petition.

[3] Meanwhile, the petitioners (except the 13th petitioner who is now deceased) have presented the second petition in this court with substantially similar facts against the respondents herein, without serving the first petition on any of the respondents.

[4] The respondents (except respondent 6) had on 16 June 2004 filed an unsealed application by way of notice of motion to strike out the second petition. The petitioners had filed the withdrawal herein on the same date.

[5] For brevity and convenience, all references hereinafter to an order and a rule are references to that order and rule in the Rules of the High Court 1980.

III PROCEDURE FOR WITHDRAWAL

[6] It was submitted by learned counsel Mr Lim Kian Leong, Miss Tan Shin Shin assisting him, that the withdrawal is invalid as there is no rule in Malaysia regulating the procedure for filing it and that, even if there is, the withdrawal must be filed with leave of the court. Reference was made to *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423 (HC); and *Saipem (M) Sdn Bhd & Anor v AG & P (M) Sdn Bhd (In liquidation) & Ors* [1996] 1 MLJ 239 (HC).

[7] Mr SP Chandra, learned counsel for the petitioners, contended, *inter alia*, that :

(1) the instant application is an abuse of the process of the court and without any merit, as the first petition had neither been served nor advertised; and

(2) in the absence of specific rules in Malaysia, the court should apply the procedure in England, ie by filing a 'Request to Withdraw Petition', relying on Vol 10 of *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* p 82 Item 5 and p 232 Form 49 ('Atkin's Vol 10'); *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1)* [1998] 1 MLJ 99 (CA); O 21 r 2(1) and O 92 r 4 of the Rules of the High Court 1980.

[8] In my view, the above submissions appear to have reached the common ground that in our jurisdiction there is no specific rule in the Companies Act 1965 ('the 1965 Act') or the Companies (Winding-Up) Rules 1972 ('the 1972 Rules') to govern the withdrawal of a petition which has yet to be served and for which there had been no advertisement.

[9] In *Companies Winding-Up Handbook (2003)* by Alex Chang Huey Wah, ('Alex Chang's Handbook') the learned advisory editor sets out at p I 121, item 27 the steps to be taken where the petitioner desires to withdraw a petition before advertisement i.e. the petitioner issues a notice of motion and, if necessary, an affidavit in support of the grounds for the withdrawal of the petition.

[10] There is no dispute that in our jurisdiction, the 1965 Act and the 1972 Rules do not prescribe any Form for the purpose as stated in Alex Chang's Handbook, since there is no rule providing for the withdrawal of the petition in the circumstances prevailing herein.

[11] However, in England, where a petitioner desires to withdraw a petition before service or advertisement, he may lodge in chambers a request to withdraw in Form 49 prescribed in the English Companies Act 1948. Form 49 specifically applies where the petition 'has not been advertised (or served)' (Atkin's Vol 10).

[12] In the circumstances, it behoves me to consider whether Atkin's Vol 10 or Alex Chang's Handbook is to be preferred.

[13] The procedure in England as contained in Atkin's Vol 10 and the statement included in Alex Chang's Handbook reveal two conspicuous differences viz:

(1) Form 49 is an integral part of the English Companies Act 1948, while there is no such Form in our 1965 Act; and

(2) Form 49 includes an alternative situation where the petition has not been served, while item 27 appears to be confined to the 'before advertisement' situation and does not appear to cover the 'before service' situation.

[14] The submissions by the respective learned counsel do not seem to dispute that the English Companies (Winding-Up) Rules and our 1972 Rules

are substantially the same. As Form 49 has been prescribed in the English Companies Act 1948, I must consider whether I should apply Form 49 pursuant to the inherent powers of the court under O 92 r 4 and make an order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[15] Order 92 r 4 was considered in the judgment of the Court of Appeal delivered by Mahadev Shankar JCA (as he then was) in *Fairview Schools* at p 1061. His Lordship observed that where the 1972 Rules make specific provisions for a particular matter, it would exclude parallel provision in the rules of the court but where the 1972 Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists. If not, it can always resort to O 92 r 4.

[16] As the 1972 Rules do not make specific provisions for the withdrawal before me, I shall ascertain the position in the Rules of the High Court 1980.

[17] Under O 21 r 2(1), in an action begun by writ, the plaintiffs may, without leave of the court, discontinue the action or withdraw any claim made by him, not later than 14 days after the service of the defence on him. This is effected by serving a notice in Form 36 to that effect on the defendant concerned. However, Form 36 read with O 21 r 2(1) do not provide for the procedure regulating the withdrawal of the instant petition.

[18] For purposes of completeness, I must state that my consideration of the authorities cited for the seventh respondent shows that *Ansa Teknik (M) Sdn Bhd* is not an authority in which the issue of withdrawal has been ventilated for judicial determination. The application for consideration by LCVohrah J (as he then was) concerns the striking out of a winding-up petition under O 18 r 19.

[19] Next, the relevant portion of the judgment in *Saipem (M) Sdn Bhd & Anor* concerns the withdrawal of the claims under O 21 r 3(1), which is not relevant to the issue before me.

[20] On the foregoing grounds, I would take the proactive step by adopting and applying, which I hereby do, the procedure as contained in Atkin's Vol 10. Hence, I hold that the withdrawal has not run foul of the procedure, neither is it fundamentally flawed.

IV DISCONTINUANCE IN NON-PETITION CASES

[21] Various authorities have been cited for the parties in connection with discontinuance in non-petition cases.

[22] It was argued for the seventh respondent that the withdrawal was filed with ulterior motive to obtain a collateral advantage:

(1) as there was duplicity of winding-up petitions, citing *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124 (HC); *Hanhyo Sdn Bhd v Marplan Sdn Bhd & Ors* [1992] 1 MLJ 51 (HC); and *Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155 (CA); and

(2) in view of the death of the 13th petitioner, seeking support in s 8(1) of the Civil Law Act 1956; and *Yong Siew Choon v Kerajaan Malaysia* [2003] 2 MLJ 150 (CA).

[23] It was contended for the petitioners that in the absence of any procedure in the 1972 Rules, O 15 r 7(1) should apply without having to add the personal representative of the 13th petitioner.

[24] In the first place, I find that the judgment of the Court of Appeal in *Yong Siew Chin* was in respect of the interpretation of O 15 r 6A(1) and (4). The facts and circumstances there have nothing to do with the withdrawal before me.

[25] On my part, I would observe that applications for discontinuance in non-petition cases such as originating summons and writ action had been dismissed where these applications had been tainted with ulterior motive for the purpose of obtaining a collateral advantage and the particular proceedings had matured to an advanced stage. There are two authorities to illustrate this proposition.

[26] First, *Overseas Union Finance Ltd* which concerns an application by way of summons-in-chambers for an order that the chargee be at liberty to discontinue the charge action commenced by way of an originating summons. Various affidavits have been exchanged after the service of the originating summons by the chargee on the chargor. The chargee's ground for discontinuance was that there would be difficulty in selling the property as its value has fallen. In dismissing the application for discontinuance, Raja Azlan Shah J (now HRH the Sultan of Perak) held that the chargor was not to be deprived of the advantage in that there were flaws in the chargee's allegations viz the wrong dates in the memorandum of the agreement for the loan, and that the reason for wanting a discontinuance was not a very strong one.

[27] Next, the Court of Appeal in *Majlis Peguam Malaysia* in the judgment delivered by Gopal Sri Ram JCA held, *inter alia*, that a judge exercising his power under O 21 r 3 which permits discontinuance has a wide discretion based on important guidelines, one of which is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. There the Bar Council was the defendant. It had been put to great expense and trouble to test the rights of the plaintiff to bring the action in the first place, and had fought on the facts and law at the trial of the preliminary issue tooth and nail. In the circumstances, the Court of Appeal allowed the appeal by the Bar Council against the decision of the trial judge who had permitted the plaintiffs

discontinuance. The Court of Appeal further stressed that it all depends on the facts and circumstances of each case. A

[28] Our courts have also allowed discontinuance but subject to terms.

[29] In *Hanhyo Sdn Bhd* Lim Beng Choon J (as he then was) in granting leave to the plaintiff to discontinue his action against the first defendant, subject to certain conditions, held that the court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant and injustice would be caused to the defendant if: B

(a) the discontinuance was made with ulterior motive to obtain a collateral advantage; C

(b) the discontinuance was not made *bona fide* by the plaintiff but was made in order to obtain an advantage which he has no right to retain since he has ceased to be dominus litis as the defendant has a perfectly good defence; or D

(c) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation.

[30] The above decision has been approved by the Court of Appeal in *Majlis Peguam Malaysia*. E

[31] Reverting to the facts herein, it is to be noted that the death of the 13th petitioner would bring about the survival of the petition for the benefit of his estate: s 8(1) of the Civil Law Act 1956. Further, O 15 r 7(1) where relevant, provides that if a party to an action dies but the cause of action survives, the action shall not abate by reason of the death. F

[32] The withdrawal would appear to give the petitioners a collateral advantage, ie by dispensing with the need for devolution of the petition upon the estate of the 13th petitioner under s 8(1) and O 15.

[33] On the basis of the above submissions, I find that no provision has been made under the 1972 Rules and the Rules of the High Court 1980 to regulate the withdrawal. I therefore invoke O 92 r 4, having regard to the Court of Appeal judgment in *Fairview Schools Bhd*. In order to prevent injustice or to prevent an abuse of the process of the court, by way of analogy I apply the principles set out in the judgment of Lim Beng Choon J in *Hanhyo Sdn Bhd*, ie to allow the withdrawal subject to terms. G H

[34] Further, it is pertinent to observe that even if the petitioners had chosen not to withdraw the petition herein, there would have been a multiplicity or duplicity of petitions, in which case there would have been a need for me to invoke the additional powers by dismissing one of the petitions, under para 11 in the Schedule to the Courts of Judicature Act 1964 which, where relevant, reads as follows: I

11 Power to dismiss proceedings where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

V OTHER ISSUES

[35] Consideration of the above submissions is in my view adequate to enable me to arrive at a definitive decision in relation to this application. I therefore express my gratitude to the respective learned counsel for their efforts in raising other issues which upon perusal would require no further analysis by me.

VI CONCLUSION

[36] In the circumstances, I allow the withdrawal but subject to the terms in 2(a) and (d)(i) of the above alternative prayers of the seventh respondent's notice of motion in encl 28, with reasonable costs to be taxed by the learned registrar of this court.

Instant petition stayed pending disposal of first petition.

Reported by Mohd Nizam Hamdan